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Federal Communications Commission

FCC 97-38

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
MARC SOBEL)	WT DOCKET NO. 97-56
)	
Applicant for Certain Part 90 Authorizations)	
in the Los Angeles Area and Requestor Of)	
Certain Finder's Preferences ¹)	
)	
MARC SOBEL AND MARC SOBEL)	
D/B/A AIR WAVE COMMUNICATIONS)	
)	
Licensees of Certain Part 90 Stations in the)	
Los Angeles Area ²)	

ORDER TO SHOW CAUSE,
HEARING DESIGNATION ORDER AND
NOTICE OF OPPORTUNITY FOR HEARING FOR FORFEITURE

Adopted: February 6, 1997

Released: February 12, 1997

By the Commission:

1. The Commission has before it (a) the above captioned pending applications and finder's preference requests filed by Marc Sobel; (b) the above-captioned licenses held by Marc Sobel and Marc Sobel d/b/a Air Wave Communications (collectively "Sobel"); and (c) the results of an investigation into possible FCC-related misconduct by Sobel. As discussed more fully below, the information before us raises serious questions as to whether Sobel is basically qualified to be and remain a Commission licensee.

2. Sobel is the licensee of record of the Part 90 land mobile stations identified in Appendix B hereto. These stations operate in either the Commercial Mobile Radio Service or

¹ The pending applications and Finder's Preference Requests which are the subject of this proceeding are identified in Appendix A.

² The licensed facilities which are the subject of this proceeding are identified in Appendix B.

the Private Mobile Radio Service.³ On June 11, 1996, pursuant to § 308(b) of the Communications Act of 1934, as amended, the Commission directed a letter of inquiry to Sobel requesting certain specific information relating to the operation and management of Sobel's stations. Sobel responded in writing on July 3, 1996.

3. The evidence before us, as provided by Sobel in his response to the letter of inquiry, indicates that on December 30, 1994, Sobel and another land mobile licensee in the Los Angeles area, James A. Kay, Jr. ("Kay"), executed a so-called Radio System Management and Marketing Agreement ("Agreement") involving several of Sobel's stations, all of which provide service to subscribers. The Agreement, as amended, expressly covers the following stations: Stations KNBT299, WNYE761, WNYR424, WPF529, WNXL471, WPAD685, KRU576, WPCN239, WPCZ354, WPCG780, WNWB334, WNZS492, WPDB603, WPFH460, and WPCA891.⁴ The Agreement contemplates, among other things, that if the stations have not already been built, Kay will construct them at Kay's expense; Kay will serve as the exclusive supplier of equipment and labor to maintain each of the stations; Kay will be the exclusive marketing agent for the sales of service to the public and/or persons eligible to receive service from each of the stations; Kay will serve as the sole manager of each of the stations; Kay will compensate all employees, agents, and independent contractors and pay all insurance, taxes and other costs arising out of the employment of workers at each of the stations; Kay will maintain all financial records and contracts associated with the operations of each of the stations; and Kay will bear all responsibility for paying utility, telephone, site rental, radio equipment, and legal expenses associated with the operations of each of the stations. In consideration for these services, the Agreement provides that Kay will receive the first \$600 of gross revenues per month from the operation of each of the stations, and half of all remaining gross revenues per month from the operation of each of the stations. The Agreement runs for 10 years and renews automatically (unless Kay elects otherwise) for five 10 year periods (for a total of 50 years). The Agreement also grants to Kay, in consideration for \$100, an irrevocable 10 year option to purchase any or all of the covered stations, including the assignment of each associated FCC license, for \$500 upon demand by Kay. The Agreement requires Sobel to maintain exclusive ownership of the subject stations during the term of the Agreement, free of all liens and encumbrances, "until and unless said license(s) are assigned to" Kay.

4. Section 310(d) of the Communications Act of 1934, as amended, states in pertinent part:

No construction permit or station license, or any rights thereunder, shall be

³ In 1993, Congress amended the Communications Act of 1934, by, among other things, creating a category of service providers in the Commercial Mobile Radio Service and extending to them many regulations applicable to common carriers. The Omnibus Budget and Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 392 (1993).

⁴ According to the Commission's database, Stations WPCN239 and WNYE761 are no longer licensed to Sobel.

transferred, assigned, or disposed or in any manner, voluntarily, or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon such finding by the Commission that the public interest, convenience, and necessity will be served thereby.

Section 310(d) has been held to prohibit de facto as well as de jure transfers of control. See Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C.Cir.1965), cert. denied, 383 U.S. 967, 86 S.Ct. 1272 (1966). In determining whether de facto control of a non-broadcast license or facility has been transferred in violation of § 310(d), the Commission and the courts have traditionally relied upon a six-part test announced in Intermountain Microwave, 24 RR 983 (1963). The six indicia of de facto control are:

- (a) Does the licensee has unfettered use of all facilities and equipment?
- (b) Who controls daily operations?
- (c) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission?
- (d) Who is in charge of employment, supervision, and dismissal of personnel?
- (e) Who is in charge of the payment of financing obligations, including expenses arising out of operating?
- (f) Who receives monies and profits from the operation of the facilities?

See also Telephone and Data Systems, Inc. v. FCC, 19 F. 3d 42 (1994),⁵ and LaStar Cellular Telephone Co., 5 FCC Rcd 3286 (1990). The Commission has held that actual control is the touchstone of the Intermountain test. See, e.g., News International, PLC, 97 FCC 2d 349, 355-56 (1984).

5. When the Intermountain factors are applied to the Agreement between Sobel and Kay, a substantial and material question arises as to whether Sobel has willfully and/or repeatedly engaged in unauthorized transfers of control of his stations to Kay, in violation of § 310(d) of the Communications Act of 1934, as amended. In this regard, the Agreement appears to convey to Kay extensive control over the construction, daily operation, maintenance, management, and marketing of Sobel's stations. The Agreement further appears to bestow upon Kay unequivocal authority over all matters involving expenses and personnel; the power to extract significant revenues from the operations of the stations; and, notably, the ability to exercise control over the present and future ownership of the stations. Although the Agreement ostensibly proclaims that Sobel shall retain ultimate supervision and control over the operations of the stations, the overwhelming thrust of the Agreement suggests that Kay's dominion over the facilities is virtually absolute. We note further that Sobel and Kay executed the Agreement a mere two weeks after the Commission formally placed Kay's basic qualifications to remain a licensee in issue. Order

⁵ This case arose from an appeal of the Commission's decision in Ellis Thompson Corp., 7 FCC Rcd 3932 (1992).

to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, 10 FCC Rcd 2062 (1994)(requiring Kay to show cause why his licenses should not be revoked). Subsequently, by Summary Decision of Administrative Law Judge Richard L. Sippel, FCC 96D-02 (released May 31, 1996), the Presiding Judge: (a) determined that Kay had willfully violated § 308(b) of the Act and abused the Commission's processes; (b) concluded that Kay is basically unqualified to be a Commission licensee; (c) revoked all of Kay's licenses; and (d) ordered Kay to forfeit \$75,000. The proceeding involving Kay is pending before the Commission on exceptions to the Presiding Judge's decision. In sum, the nature and timing of Sobel's arrangement with Kay raise serious questions concerning Sobel's compliance with § 310(d) of the Act and, as a consequence, Sobel's basic qualifications to be and remain a Commission licensee.

6. Accordingly, IT IS ORDERED that, pursuant to §§ 309(e), 312(a), and 312(c) of the Communications Act of 1934, as amended, the above-captioned applications of Marc Sobel are designated for hearing, and Marc Sobel is directed to show cause why his above-captioned licenses should not be revoked, in a consolidated proceeding before an FCC Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

- (a) To determine whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications have willfully and/or repeatedly violated § 310(d) of the Communications Act of 1934, as amended, by engaging in unauthorized transfers of control of their respective stations to James A. Kay, Jr.;
- (b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications are qualified to be and remain Commission licensees;
- (c) To determine whether the above-captioned applications filed by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be granted.
- (d) To determine whether the above-captioned licenses held by Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications should be revoked.

7. IT IS FURTHER ORDERED that irrespective of the resolution of the foregoing issues, it shall also be determined, pursuant to § 503(b)(2)(B) of the Communications Act of 1934, as amended, whether an Order of Forfeiture shall be issued against Marc Sobel and/or Marc Sobel d/b/a Air Wave Communications in an amount not to exceed \$100,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$1,000,000 for any single act or failure to act, for having willfully and/or repeatedly violated § 310(d) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED that, in connection with the possible forfeiture liability noted above, this document constitutes notice, pursuant to § 503(b)(3) of the Communications Act of 1934, as amended.

9. IT IS FURTHER ORDERED that to avail themselves of the opportunity to be heard pursuant to §§ 1.91(c) and 1.221(c) of the Commission's Rules, Sobel and Sobel d/b/a Air Wave Communications, in person or by their attorneys, shall each file with the Commission within twenty (20) days of the date of this document a written appearance stating that he will appear at the hearing and present evidence on the matters specified herein.

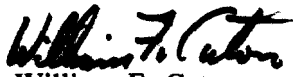
10. IT IS FURTHER ORDERED that pursuant to § 312(d) of the Communications Act of 1934, as amended, and § 1.254 of the Commission's Rules, the burden of proceeding with the introduction of evidence and the burden of proof with respect to the issues at ¶¶ 6(a), 6(b), and 6(d) above shall be on the Wireless Telecommunications Bureau, and burden of proceeding with the introduction of evidence and the burden of proof with respect to the issue at ¶ 6(c) above shall be on Sobel.

11. IT IS FURTHER ORDERED that the Wireless Telecommunications Bureau shall hold in abeyance the captioned finder's preference requests pending final resolution of the issue at ¶ 6(b) above as to whether Sobel is qualified to be and remain a Commission licensee.

12. IT IS FURTHER ORDERED that the Acting Secretary of the Commission shall send a copy of this Order via Certified Mail - Return Receipt Requested to Sobel's counsel: Robert Keller, Esq., 2000 L St. N.W., Suite 200, Washington, D.C. 20036.

13. IT IS FURTHER ORDERED that the Acting Secretary of the Commission shall cause to have this Order or a summary thereof published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A

Pending Applications Filed by Sobel

<u>File No.</u>	<u>Date Filed</u>	<u>Call Sign</u>	<u>Frequency</u>	<u>Service</u>	<u>Type</u>
1. 670861	6/9/94	KKT934	851.8875	Conventional SMR	Assignment
2. 415367	4/18/94	..	507.2875	Business	New
3. 697577	3/22/95	WPAD695	852.1625 852.4125	Trunked SMR	Modification
4. 416021	7/31/95	..	472.4125	Business	New
5. 154618	5/16/95	..	463.6750	Business	New
6. 501542	4/17/95	WPCZ354	853.1375	Conventional SMR	Reinstate
7. 666673	5/6/94	WNWB334	854.0375	Conventional SMR	Modification
8. 415478	9/16/94	..	471.9375	Business	New
9. 614567	11/13/92	WNZS492	854.0875	Conventional SMR	Modification
10. R28310	12/15/94	WIJ716	471.8375 474.8375	Business	Renewal
11. R28311	12/15/94	KD53189	465.7375 468.7375 468.6125 463.4875 463.6125 468.5375 463.5375	Business	Renewal
12. D024171	2/20/96	WIK833	471.5125 474.5125	Business	Assignment
13.	1/24/96	WIK833	471.5125 474.5125	Business	Renewal

Pending Finder's Preference Requests Filed by Sobel

1. Finder's Preference Case 93F600, seeking a preference for station WNYQ465, licensed to Lance Hardy Advertising. Frequency: 854.0875 (finder also targets 809, which is not on the license). Service: Conventional SMR.
2. Finder's Preference Case 93F622, seeking a preference for station WNPP641, licensed to Western Waste. Licensed frequency pair: 853.1375, 808.1375. Service: Business, Conventional.
3. Finder's Preference Case 93F683, seeking a preference for station WNGH521, licensed to Fleet Disposal. Frequencies: 852.2625, 806.2625, 807.2625. Service: Business, Conventional.
4. Finder's Preference 93F758, seeking a preference for station WNKR724, licensed to LVJ Leasing, Inc. Frequencies: 852.1375, 807.1375. Service: Business, Conventional.
5. Finder's Preference Case 94F323, seeking a preference for station WNXG598, licensed to Jerry R. Wilcox. Frequencies: 852.1375, 807.1375. Service: Business, Conventional.

APPENDIX B

Part 90 Licenses Held by Sobel and/or Sobel d/b/a Air Wave Communications

	<u>Call Sign</u>	<u>Service</u>	<u>Frequencies (MHz)</u>
1.	KAC8275	GMRS	462.6750, 467.6570
2.	KD53189	Business	465.8875, 468.7375, 468.6125, 463.4875, 463.6125, 468.5375, 463.5375
3.	KNBT299	Conventional SMR	851.1125, 806.0000, 851.0000
4.	KRU576	Conventional SMR	852.5125, 806.0000, 851.0000
5.	WIH718	Business	471.2875, 474.2875
6.	WIJ516	Business	471.8375, 474.8375
7.	WIJ698	Business	474.8375
8.	WIJ716	Business	471.8375, 474.8375
9.	WIK548	Business	471.2875, 475.2875
10.	WIK657	Business	472.4875, 475.4875
11.	WIK833	Business	471.5125, 474.5125
12.	WIL516	Business	472.8125, 475.8125
13.	WIL598	Business	471.4125, 474.4125
14.	WNPX844	Business	462.1250, 467.1250, 462.0625, 467.0625
15.	WNPY680	Conventional SMR	851.4125, 806.0000, 851.0000
16.	WNWB334	Conventional SMR	854.0375, 806.0000, 851.0000
17.	WNXL471	Conventional SMR	852.2625, 806.0000, 851.0000
18.	WNYR424	Conventional SMR	852.1375, 806.0000, 851.0000
19.	WNZC764	Business	806.0000

20.	WNZJ445	Business	468.6750, 463.6750, 469.5125, 464.5125, 468.5625, 463.5625, 467.8625, 462.8625, 466.2125, 461.2125
21.	WNZS492	Conventional SMR	854.0875, 806.0000, 851.0000
22.	WPAD685	Conventional SMR	852.4125, 806.0000, 851.0000
23.	WPCA891	Conventional SMR	854.0375, 806.0000, 851.0000
24.	WPCZ354	Conventional SMR	853.1375, 806.0000, 851.0000
25.	WPDB603	Conventional SMR	854.3875, 806.0000
26.	WPFF529	Conventional SMR	852.2625, 806.0000, 851.0000
27.	WPFH460	Conventional SMR	853.1375, 806.0000, 851.0000
28.	WPCG780	Conventional SMR	853.5875, 806.0000, 851.0000